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No. 98-10002

In The
Supreme Court of The United States

GARY GRAHAM,
Petitioner,

v.

GARY JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower court erred in dismissing a petitioner's fourth federal habeas petition as a successive petition under 28 U.S.C. § 2244(b), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), when the petitioner's first federal habeas petition had been previously litigated to finality on the merits, applying the successive petition standards of the AEDPA does not offend retroactivity principles, and the fourth petition was not filed in a timely manner.

2. Whether the lower court erred in refusing to grant a petitioner's motion to recall a prior mandate when the petitioner's motion was merely an attempt to circumvent application of the successive petition bar of 28 U.S.C. § 2244(b), as amended by the AEDPA, and the petitioner failed to act with due diligence.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through the Attorney General of Texas and files this Brief in Opposition.[1]

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the district court dismissing Graham's petition for federal writ of habeas corpus is published at *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999).

[1] For clarity, the respondent will be referred to as "the Director" and the petitioner as "Graham."

JURISDICTION

Graham seeks to invoke the jurisdiction of the Court under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Graham alleges the denial of rights guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below

In June 1981, Graham was indicted in Harris County, Texas, in cause no. 335378, for the capital offense of murdering Bobby Lambert in the course of committing and attempting to commit robbery and for the felony offenses of murder (two counts) and aggravated robbery. Tr 5.[2] On October 26, 1981, the State abandoned the non-capital charges and Graham entered a plea of not guilty to capital murder. Tr 110-11. The jury found Graham guilty of capital murder on October 28, 1981. Tr 63, 114. A separate punishment hearing ensued, and, on October 30, 1981, the jury answered affirmatively the three special issues submitted pursuant to the former Article 37.071 of the Texas Code of Criminal Procedure. Tr 70-72, 116.[3] In accordance with state law, the trial court (the 182nd District Court of

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[2] "Tr" refers to the documents filed in the underlying cause, or transcript, by volume and page number. "SR" refers to the transcription of the trial proceedings, or statement of facts, by volume and page number.

[3] The trial court submitted the following special issues to the jury:
(1) Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
(2) Do you find from the evidence beyond a reasonable doubt

Harris County, Texas) assessed punishment at death. Tr 73-75.

Graham's conviction and sentence of death were automatically appealed to the Texas Court of Criminal Appeals, which affirmed in an unpublished opinion issued June 13, 1984. *See Graham v. State*, 671 S.W.2d 529 (Tex.Crim.App. 1984). Graham did not seek certiorari review to this Court.

On July 13, 1987, Graham filed his first application for state writ of habeas corpus. After an evidentiary hearing, the trial court recommended that the application be denied. In an unpublished opinion issued on February 19, 1988, the Court of Criminal Appeals denied Graham's first application for state writ of habeas corpus. *Ex parte Graham*, No. 17,568-01. Graham did not seek certiorari review to this Court.

Graham then filed his first federal habeas petition in the United States District Court for the Southern District of Texas on February 23, 1988. *Graham v. Lynaugh*, Civil Action No. H-88-563. The district court denied relief on February 24, 1988, in an unpublished opinion. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on August 31, 1988. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir. 1988). However, on June 3, 1989, this Court remanded the case for further consideration. *Graham v. Lynaugh*, 492 U.S. 915 (1989). On remand, the Fifth Circuit vacated Graham's death sentence on March 7, 1990. *Graham v. Lynaugh*, 896 F.2d 893 (5th Cir. 1990). On January

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> that there is a probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?
> (3) Do you find from the evidence beyond a reasonable doubt whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

Tr 70-72.

3, 1992, the Fifth Circuit, however, reversed itself and denied habeas relief. *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992). This Court granted certiorari review, and. on January 25, 1993, affirmed the denial of habeas relief. *Graham v. Collins*, 506 U.S. 461 (1993). On March 1, 1993, the Court denied rehearing. *Graham v. Collins*, 507 U.S. 968 (1993).

On April 20, 1993, Graham filed a second application for state writ of habeas corpus. That application was denied by the Court of Criminal Appeals on April 27, 1993. *Ex parte Graham*, 853 S.W.2d 564 (Tex.Crim.App. 1993) (No. 17,568-02). This Court denied certiorari review on May 24, 1993. *Graham v. Texas*, 508 U.S. 945 (1993). On June 2, 1993, the Court of Criminal Appeals overruled a motion for reconsideration filed by Graham. *Ex parte Graham*, 853 S.W.2d 565 (Tex.Crim.App. 1993) (No. 17,568-03).

In the interim, on April 28, 1993, Graham had filed a second federal habeas petition in the United States District Court for the Southern District of Texas, which he voluntarily dismissed the day it was filed. On July 22, 1993, Graham filed his third federal habeas petition in the United States District Court for the Southern District of Texas. *Graham v. Collins*, Civil Action No. H-93-2217. The district court denied relief on August 13, 1993. *Graham v. Collins*, 829 F.Supp. 204 (S.D.Tex. 1993). On August 28, 1996, the Fifth Circuit, declining to accept the State's waiver of the exhaustion requirement, remanded the third federal habeas petition to the district court with directions to dismiss the petition without prejudice for failure to exhaust state court remedies. *Graham v. Johnson*, 94 F.3d 958 (5th Cir. 1996). Graham's motion for rehearing was denied on September 26, 1996. On remand, the district court entered an order on October 11, 1996, dismissing Graham's third federal habeas petition without prejudice for failure to exhaust state court remedies.

Graham sat idle for more than one and a half years, then filed his third application for

state writ of habeas corpus on April 27, 1998. In an unpublished opinion issued on November 18, 1998, the Court of Criminal Appeals dismissed that application pursuant to Texas' statutory prohibition against successive applications. *Ex parte Graham*, No. 17,568-05. Graham did not seek certiorari review to this Court.

On December 18, 1998, Graham filed his fourth federal habeas petition in the United States District Court for the Southern District of Texas. *Graham v. Johnson*, Civil Action No. H-98-4241. On January 7, 1999, the district court found that it lacked jurisdiction to consider the petition and dismissed the petition. *Graham v. Johnson*, 45 F.Supp.2d 555 (S.D.Tex. 1999). On February 25, 1999, the Fifth Circuit affirmed the district court's dismissal, denied Graham authorization to file a successive petition, and denied a motion to recall the mandate regarding Graham's third federal petition. *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999). On March 23, 1999, a motion for rehearing was denied. Graham's petition for writ of certiorari followed. An execution date has not been set to date.

B. Statement of Facts

Guilt-Innocence Phase

During Graham's 1981 trial, Wilma Amos testified that she arrived at a Safeway grocery store, located at 8945 North Freeway, in Houston, Harris County, Texas, at approximately 9:21 p.m. on May 13, 1981. 14 SR 159-160. While inside the grocery store, Amos spoke with a man whom she later identified as the victim, Bobby Lambert. 14 SR 160-162. Amos talked to Lambert about the price of gloves as Lambert was selecting a pair of gloves. 14 SR 160-163. Amos also saw a man, wearing dark pants and a white jacket, who was walking slowly and looking at Lambert. 14 SR 163-164, 178. As Amos stood in the check-out line, she saw that man leave the store. 14 SR 163-164. Amos left the line to get another item, and when she returned, Lambert had left the store carrying a grocery bag.

14 SR165-166.

After leaving the grocery store, Amos went to her van in the parking lot and heard someone blow a car horn. 14 SR 168-69. Amos noticed two people, Lambert and the other man she had seen earlier, "tusseling." 14 SR 169-171. Amos stood in front of her van and watched the other man shoot Lambert and then run toward the back of the store. 14 SR 172-173. Amos could not remember the shooter's physical features to identify him, and testified that after the shooting she returned home and drank "half a fifth [of vodka]" to "get [her] nerves together." 14 SR 172-173, 175. Amos was also taking Valium during May 1981. 14 SR 174.

Daniel Grady testified that he arrived at the Safeway store between 9:30 p.m. and 10:00 p.m. and remained in his 1972 Oldsmobile, parked in front of the door, while his wife went inside the store. 14 SR 193-95. Grady testified that he could see faces, people, and objects in the parking lot. 14 SR 197. Grady saw a man later identified as Lambert exit the store carrying a bag of groceries. 14 SR 197, 212-13. As Lambert walked in front of Grady's car, a man, wearing dark pants and a white jacket, bumped into Lambert. 14 SR 197-200. As the man reached around to Lambert's back pocket for his wallet, Lambert dropped his groceries and tried to get away from the man. 14 SR 201-02. The attacker then drew a pistol, his arms fully extended, and shot Lambert. 14 SR 204-07. Lambert had nothing in his hands after he dropped his groceries. 14 SR 207-08. Grady dropped to the floorboard of his car when he heard the shot and crawled toward the other car door to let himself out. 14 SR 209. When Grady got out of the car, he saw the shooter running across the parking lot. 14 SR 209-12. Lambert propped himself up on the hood of Grady's car, then began walking toward the store. 14 SR 210-12. Just before Lambert collapsed in the doorway, Grady came to his assistance and Lambert subsequently died in Grady's arms. 14 SR 212-

14. Although Grady saw the shooter's face, he did not think he could identify him. 14 SR 209.

Bernadine Skillern testified that she arrived at the Safeway at about 9:30 p.m. with her three children. 14 SR 233-34. After she dropped her oldest daughter off at the store's entrance, she circled the lot then parked under a double lamp. 14 SR 235. She stayed in her car with her other two children who were attempting to sleep in the back seat. 14 SR 235-36. Skillern watched Lambert walk alone out of the grocery store carrying a grocery sack. 15 SR 236-37. The parking lot was well-lit; she could see and recognize people. 15 SR 240.

Skillern watched a man, dressed in dark pants and a white jacket, approach Lambert from the rear. 15 SR 322-23. Skillern identified Graham as the man who approached Lambert. 15 SR 331, 352-53. Skillern testified that Graham approached Lambert from behind at an angle and touched Lambert's pants pocket. 15 SR 323-26. Lambert then turned to face Graham. 15 SR 326-27. Graham grabbed Lambert by the neck and held a gun to Lambert's head. 15 SR 327-29. Skillern honked her car horn and Graham turned and looked directly at her. 15 SR 330-31. Then, standing with his arms fully extended, Graham shot Lambert. 15 SR 332-33. Lambert fell against Grady's car, then slid off onto the ground. 15 SR 332. Skillern then started her car, turned on her lights, and followed Graham as he walked quickly to the cross street. 15 SR 336-38. Then, Graham hesitated, looked back at Skillern, and began to run. 15 SR 337-38. Skillern quit following Graham because her children were screaming. 15 SR 341.

Meschell Gilliam testified that she was working as a checker at the Safeway store on the night of the offense and that Lambert bought twenty dollars worth of groceries with a hundred dollar bill. 14 SR 57-59. When J. W. Ellis, Houston Police Department Detective, looked in Lambert's pockets at the scene of the offense, he found sixty one-hundred dollar

bills and miscellaneous coins. 14 SR 78-79.

The medical examiner conducted an autopsy of Lambert on May 14, 1981, and recovered a bullet consistent with a .22 caliber gun. 15 SR 397-98, 403. Lambert died from a gunshot wound to the chest. 15 SR 403, 405. The absence of soot around the wound indicated that the shooter had held the gun at least eighteen inches from the entry of the wound. 15 SR 404.

Punishment Phase

Linda Jennings testified that on May 14, 1981, she and her friend Karen drove to a car wash about 9:15 p.m. to wash a Cadillac that she had borrowed from George O'Bear to use for her high school prom. 17 SR 95-97. After the girls pulled into one of the brightly lit car wash stalls, Graham pulled his car in behind their car. 17 SR 98-99. Graham spoke to Karen as Jennings washed the car. 17 SR 100. As Jennings finished washing her car, Graham got in her borrowed car on the driver's side; Karen was already sitting in the passenger seat by that time. 17 SR 102-04. Graham offered to give Jennings a check for $9,000 for the car, but Jennings asked Graham to get out of the car. 17 SR 104-06. Instead of getting out of the car, Graham started the car. 17 SR 106. When Jennings again asked Graham to get out of the car, Graham pulled a gun from his briefcase, put it in Karen's face, and told her to "get out, bitch." 17 SR 106-07. After Karen ran from the car, Graham pointed the gun at Jennings' chest and told her to move. 17 SR 108. Graham then drove away in Jennings' borrowed Cadillac with Jennings' purse still in the car. 17 SR 110.

On May 14, 1981, at approximately 10:00 p.m., Greg Jones was sitting in his van in the parking lot of a Stop-and-Go waiting for a friend to buy cigarettes. 17 SR 296-97. Graham came out of the store, approached Jones' friend, and began talking to him. 17 SR 299. As Jones' friend entered the store, Graham approached Jones' van, asking him if he

wanted to buy some marijuana 17 SR 300. After Jones told Graham he had no money, Graham asked Jones if he wanted to smoke some marijuana with him. 17 SR 300. After Jones' friend returned from the store, Graham and another male got in the van with Jones and his friend to smoke some marijuana. 17 SR 300-02. Jones moved the van further from the store, and all four smoked one marijuana cigarette. 17 SR 303. Afterwards, Graham pulled out a gun, stuck the gun to Jones' head, smiled, and said "I'm just a hustler." 17 SR 304. With the .38 cocked, Graham said that he wanted it all and took Jones' wallet and watch. 17 SR 305. Graham then hit Jones in the mouth with the gun about five times. 17 SR 307-08. The gun fired and wounded Jones in the neck. 17 SR. 308. Jones and his friend jumped from the van and ran to the store. 17 SR 309. Graham and the other male drove away in Jones' van. 17 SR. 309.

On May 15, 1981, at approximately 4:40 p.m., Graham approached Yale Salsgiver, who was in his green Ford van, and asked for directions to North Shepherd then for a ride to a Jack-in-the-Box on North Shepherd to see a friend. 18 SR 463-66. Salsgiver agreed to give Graham a ride and Graham entered the van with a small bag. 18 SR 466. After they arrived at a Jack-in-the-Box on North Shepherd, Graham told Salsgiver that it was the wrong one. 18 SR 467. Salsgiver continued driving at Graham's direction until he stopped at a parking lot. 18 SR 467-68. Graham then pulled a sawed-off shotgun, in two pieces, from his bag. 18 SR 469-70. Salsgiver grabbed the barrel of the shotgun, got out of the van, and tried to pull Graham from the van. 18 SR 470-71. Graham, who now sat in the driver's seat, started to drive away in Salsgiver's van as Salsgiver tried to hit Graham with the barrel of the shotgun. 18 SR 471. Graham grabbed the barrel of the shotgun from Salsgiver, backed up the van, and hit Salsgiver with the van knocking him to the ground. 18 SR 471-72. Graham then drove away in Salsgiver's van. 18 SR 472.

On May 15, 1981, at approximately 6:30 p.m., Graham stepped out of a green van, yelled at Emory Dedman, and then walked over to Dedman's car as Dedman began to drive out of his parking space at his place of employment. 17 SR 74-76. Dedman stopped his car and lowered his window. 17 SR 77. Graham asked Dedman for directions to North Shepherd. 17 SR 78. As Dedman again began to drive away, Graham again yelled; Dedman stopped and Graham asked for a jump for his car battery. 17 SR 78-79. After Dedman drove his car, a silver Cadillac Seville, license plate number VEW-446, over to the van, he asked Graham for a screwdriver to open the battery caps. 17 SR 79-80. After Graham walked to the back of the van and returned, he said "mother fucker, come over here." 17 SR 80. Graham then pulled a paper away revealing a shotgun which he pointed at Dedman's stomach from a distance of about three or four feet. 17 SR 80-81. Graham forced Dedman into his van and took his wallet, cash, watch, office keys, and car keys while threatening to "blow [Dedman] away." 17 SR 82-87. Graham threw Dedman's office keys to the back of the van and told him to stay on the floor of the van for ten minutes, or he would come back and blow his head off. 17 SR 87-88. Graham then drove away in Dedman's Cadillac. 17 SR 88.

On May 15, 1981, Richard Carter had parked in the well-lighted parking garage of the Aquarium Club at about 8:30 or 8:35 p.m. when Graham drove up in a silver Cadillac, license plate number VEW-446. 17 SR 264-67. Graham backed the Cadillac into a space so close to Carter's car that Carter could not get out of the car. 17 SR 267. After Carter told Graham that he could not get out of his car, Graham moved the Cadillac so that Carter could get out of his car. 17 SR 268-69. After Carter got out of the car, he and Graham talked for about ten or fifteen minutes. 17 SR 269-70. As Carter began walking away, Graham called Carter back to Graham's car and asked Carter if he knew directions to an address on South

Post Oak. 17 SR 271. Carter gave Graham directions while Graham sat in his car smoking marijuana. 17 SR 271-72. Graham asked Carter if he wanted to smoke. 17 SR 272. When Carter refused, Graham offered to sell Carter a pound of marijuana out of his trunk for fifty dollars. 17 SR 272.

Carter walked to the trunk of the car and Graham "popped" the trunk so that it would open. 17 SR 273. Graham then got out of the car carrying a sawed-off shotgun with the hammer pulled back, telling Carter to "get [his] white ass down behind the car." 17 SR 273-74. Graham told Carter that he was going to "shoot [his] fucking head off." 17 SR 274. Graham then forced Carter to give him his wallet and car keys, poking Carter in the head with the shotgun when he hesitated. 17 SR 276-78. Graham then opened Carter's car trunk, removed Carter's toolbox, and placed it in the trunk of the Cadillac. 17 SR 281-83. When Graham saw Carter looking at the license plate of the Cadillac, Graham told Carter to get his eyes off the license plate or he was going "to shoot [his] fucking brains out." 17 SR 283. Graham then told Carter that he had been a "good little white boy" and asked him if he wanted to keep his car. 17 SR 283. Graham threw Carter's car keys to the parking level below and walked over to the Cadillac. 17 SR 284-85. Before he left, Graham returned and removed Carter's cowboy hat from Carter's head and put it on his own head. 17 SR 285-86. After Graham drove away in the Cadillac, Carter turned around and saw that Graham had stopped halfway down the ramp and placed Carter's hat on a parked car. 17 SR 286. When Graham saw Carter watching him, Graham said that since Carter was not "a good little white boy," he could not have his hat back. 17 SR 286. Graham then took the hat and drove away. 17 SR 286.

Carter entered the club where he informed police of the incident. 17 SR 287. Carter stayed in the club until midnight or 1:00 a.m. when he left with a girl and walked her to her

car in the parking garage. 17 SR 287-88. As Carter and the girl stood by the car kissing, Carter saw somebody emerge from the front of the car and someone from the back of the car. 17 SR 288-89. Carter then realized that Graham was approaching them from the back of the car. 17 SR 289-90. Carter told the girl that Graham had robbed him earlier. 17 SR 290. The girl ran away screaming, and Carter turned around. 17 SR 291. When Carter turned around he saw that Graham was wearing Carter's cowboy hat and carrying a shotgun in his pants. 17 SR 291. When Graham saw Carter, Graham's eyes widened and his mouth dropped open. 17 SR 291. Graham started to back up, pulling his shotgun from his pants, and calling Carter a "rotten motherfucker." 17 SR 291-92. Graham jammed the shotgun in Carter's stomach, and Carter told him that he had already taken it all. 17 SR 292. Graham and the other male ran away as people and police arrived from the club. 17 SR 292.

On May 18, 1981, at approximately 2:30 p.m., Mohsen Nematolli was drinking beer in the parking lot of the Marriott Hotel with his friends, Linda and Rocky, after getting off work at the hotel. 18 SR 445-47. Graham approached them and asked Nematolli if he wanted to buy Graham's belt buckle for fifty dollars. 18 SR 448-49. Nematolli refused, then got in the car with his friends. 18 SR 450. As he was changing his shirt in the back seat of the car, Nematolli heard Graham say "you son of a bitch, motherfucker, give me your shit." 18 SR 450-51. When Nematolli told Graham, who was almost inside the car, to get out of the car, Graham hit Nematolli in the head with a gun, cocked the gun, and placed it in Nematolli's mouth. 18 SR 451-53. Graham asked Nematolli for his watch, ring, and wallet, then told him to get out of the car. 18 SR 454. Nematolli got out of the car, and saw another man in the passenger seat of a nearby car pointing a shotgun at Rocky's car. 18 SR 455. Graham searched Nematolli for more money, while holding the gun in his ribs, and then told him to get back in the car. 18 SR 456. Graham then ordered Linda out of the car, touched

her breasts, and took her wedding ring and money. 18 SR 457-59. Graham then told Linda to get back in the car, and told Rocky to start the car, turn his face away, and back up the car. 18 SR 459-60. Graham and his companion exited the parking lot in the opposite direction. 18 SR 461.

On May 18, 1981, Ernest Doakes was attending a high school graduation party with a friend Charles Gill. 17 SR 247-48. At about 11:00 p.m., he and Gill went to the Embassy Apartments on North MacGregor to drop off some items. 17 SR 248. While Doakes waited in the car for Gill, Graham and another male parked next to Doakes' car. 17 SR 249-51. Graham walked to the passenger side of the car, opened the door so that the inside light illuminated the car, pointed a pistol at Doakes' ribs, and told him to move over. 17 SR 251. Graham then got in the car with Doakes, while Graham's companion got in the car on the other side, sandwiching Doakes between the two of them. 17 SR 252-54. As Graham's companion started the car and began driving away, Graham, continuing to point a gun at Doakes, took Doakes' wallet. 17 SR 253-55. When Doakes asked them to just take the car and let him out, the other male told Doakes to shut up or they would "kill his ass anyway." 17 SR 255. After driving a couple of blocks, they stopped the car and told Doakes to get out. 17 SR 257. Doakes got out of the car, then Graham moved over to the driver's seat and drove away in the 1979 Mercury Marquis. 17 SR 257.

On May 19, 1981, at approximately 6:15 p.m., Richard Sanford was walking toward his car in a parking garage when Graham approached him and asked him directions to either North or South Shepherd. 17 SR 225-29. Sanford gave Graham directions, but as Sanford was getting in his car, Graham pointed a gun at Sanford's stomach and told him to "get in the car, motherfucker." 17 SR 229-31. Graham got in the driver's side of the car with Sanford and threatened to shoot him if he caused trouble. 17 SR 232. Graham demanded

Sanford's wallet and asked Sanford how much money he had in the wallet. 17 SR 232-33. When Sanford answered forty-nine dollars, Graham threatened to kill Sanford if he had lied. 17 SR 234. Graham took Sanford's ring and watch, then told Sanford that he had killed six people already and that he would kill Sanford if he did something stupid. 17 SR 235-37. Graham rifled through Sanford's briefcase in the back seat and looked in Sanford's car trunk. 17 SR 237. Graham got back in the car and started it, cocking the gun and pointing it at Sanford's stomach. 17 SR 239. Graham then drove to a stairwell, ordered Sanford into the stairwell, and followed him into the stairwell where he searched Sanford's pockets and coat. 17 SR 239-41. Graham pointed the gun at Sanford's stomach and ordered him back in the car. 17 SR 241-42. He told Sanford to lie face down in the back seat and wait there for five minutes, or his "partner" would shoot him. 17 SR 242-43.

On May 29, 1981, at approximately 2:30 or 3:00 a.m., Lisa Blackburn, a fifty-seven year old cab driver, was pumping gas at a gas station when Graham approached her and asked if she needed help. 18 SR 381-83. After Blackburn finished pumping gas, Graham told her his car had broken down and asked if she would drive him to the Tidwell Exit. 18 SR 383-84. Graham sat in the front seat of the cab and did not move even after Blackburn asked him to sit in the back seat. 18 SR 348-85. Blackburn drove Graham to Tidwell, where he then directed her to an apartment building parking lot. 18 SR 385-86. When the cab stopped, Graham opened the door, put his hand over his sock, pulled out a gun, and pointed it at Blackburn. 18 SR 386. Graham informed Blackburn that he would take her money, then ordered her to back her car into a carport. 18 SR 387-89. Graham rummaged through the glove compartment of the car then ordered Blackburn to "get out." 18 SR 389. After directing Blackburn to the trunk of the car, Graham rummaged through the trunk compartment where he found Blackburn's .38 caliber gun which he then trained on

Blackburn after putting his own gun in his belt. 18 SR 389-91.

Graham, who seemed displeased that Blackburn was carrying only fifteen dollars, told Blackburn that he needed six hundred dollars. 18 SR 392. Graham then told Blackburn that he thought he was "going to make it" with her. 18 SR 392. When she replied that she was "too old for that," Graham struck her in the face and said "don't lie." 18 SR 392. Graham and Blackburn got back in the car, and Graham, while holding a gun on Blackburn, drove to a vacant apartment. 18 SR 393. Graham entered the apartment by sticking his hand in a broken window by the door and opening the door. 18 SR 394-95.

Inside the apartment, Graham turned on the lights, and told Blackburn to take off her clothes and get against the wall. 18 SR 396-97. After Blackburn removed her clothes, Graham touched her vaginal area "like an examination" and told her to sit down. 18 SR 398-99. He threatened to "fuck her...in the ears and the eyes and everyplace else." 18 SR 399-400. Blackburn testified that Graham then did all of the things that he said he was going to do. 18 SR 400. While Graham lay on top of Blackburn, he held the gun directly over her head. 18 SR 401-02. Graham forced Blackburn's legs as far over her head as they would go and had sexual intercourse with her. 18 SR 401-02. When Blackburn screamed, Graham forced her to turn over and unsuccessfully attempted anal intercourse with her. 18 SR 402. Blackburn, who feared that Graham would kill her in the vacant apartment where no one would find her body, then informed Graham that she lived in a warm and comfortable apartment where she might find more money for him. 18 SR 403. Graham agreed to go to Blackburn's apartment but told her that if anyone were at her apartment, he would kill them both. 18 SR 404.

After Graham and Blackburn arrived at her apartment, Graham searched through Blackburn's closets and belongings for money. 18 SR 408. He told her not to move because

he did not have anything to lose and, though he did not plan on getting caught, knew he would burn if he did. 18 SR 408. Graham stole jewelry and anything he found of value, placing it on the landing at the top of the stairs. 18 SR 408-09. After about an hour and a half, Blackburn noticed a change in Graham's balance and movements. 18 SR 410-12. Graham told her that they were going to finish what they started and ordered her to undress. 18 SR 412-13. Blackburn asked Graham to undress first; Graham did and got in bed with the gun. 18 SR 413. Graham told Blackburn to "suck" him and again ordered her to undress. 18 SR 413. However, as Blackburn began to undress, she realized that Graham was falling asleep, so she waited for awhile then took the gun, his clothes, and the money he had taken from her. 18 SR 413-15. She thought about killing Graham. 18 SR 415. After Blackburn decided not to kill Graham, she left her apartment and locked Graham inside. 18 SR 415. She asked the apartment management to telephone the police. 18 SR 416. Blackburn waited outside her door for the police who subsequently arrested the naked Graham after awakening him in Blackburn's bed. 18 SR 416-17, 428-29. At the time of his arrest, Graham's billfold contained an Exxon credit card with the name Richard B. Sanford on it. 18 SR 431-32.[4]

Cathy Thornton, an employee at the Texas Youth Council, testified that she knew Graham and was familiar with Graham's reputation in the community in which he lives and among those people with whom he resides. 18 SR 442-43. Graham's reputation was bad. 18 SR 443.[5]

Graham then presented the testimony of his stepfather who testified that Graham lived

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[4] All of the witnesses, with the exception of Blackburn who was present at his arrest, positively identified Graham from lineups after his arrest.

[5] On January 6, 1982, after the instant trial, Graham entered pleas of guilty to ten counts of aggravated robbery and was sentenced to twenty-year concurrent prison terms for offenses committed on May 14, 15, 16, 18, 19, and 20, 1981.

with his father, that he visited his mother once or twice a week, that Graham was nice to him, and that Graham would do what he was asked to do, such as mowing the yard, cleaning, and helping his mother. 18 SR 475-77. Graham was fifteen when he first met his stepfather. 18 SR 477. Graham was not violent, never fought with his stepfather, and was respectful of his mother, who was on medication for a nervous condition, and cared for her. 18 SR 478. Graham had three brothers, and two children ages four and two whom he tried to provide with money or clothing. 18 SR 478-79.

Graham's grandmother testified that he stayed with her at times. 18 SR 481. Graham was about three years old when he first stayed with her because his mother had a nervous condition and mental illness and goes to the hospital "now ever since then." 18 SR 481-82. She kept Graham occasionally until he was nine, ten, or eleven. 18 SR 482. Graham would stay with his mother when she was released from the hospital, but she had been in the hospital about twenty times. 18 SR 483. Graham's father took Graham to live with him when Graham was about eleven or twelve, and he had lived with his father ever since. 18 SR 484. Graham would attend church when he lived with his grandmother because he loved the Lord. 18 SR 485. Graham attended school, never gave her any problems, and was never violent. 18 SR 485-86. She also had never known Graham to have weapons around him. 18 SR 486.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. Graham fails to advance a compelling reason for this Court to review his case, and

none exists.

In March 1993, Graham's first federal habeas petition, which had been filed in 1988 ("the 1988 petition"), was litigated to finality on the merits. Claims rejected during the litigation of that petition included claims of ineffective assistance of trial counsel for failure to investigate alibi witnesses. Graham's next two federal habeas petitions were dismissed without a merits review; one being voluntarily dismissed by Graham shortly after it was filed, and the other, which had been filed in July 1993 ("the 1993 petition"), being dismissed for failure to exhaust state remedies in 1996.[6] Thereafter, Graham took no further action in state or federal court for more than one and a half years, eventually filing a fourth federal habeas petition in 1998 ("the 1998 petition"). The 1998 petition chiefly contained claims of ineffective assistance of trial counsel. The lower court found that the 1998 petition was barred by 28 U.S.C. § 2244(b), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA").

Recent decisions of this Court compel one conclusion to Graham's perpetual filing of federal habeas corpus petitions – it must come to an end. To be sure, Graham conceded in the lower court that the 1998 petition was successive in relation to the 1988 petition. But, even if Graham somehow escapes the successive petition bar, his failure to act for more than one and a half years after his 1993 petition was dismissed, which all occurred after the enactment of the AEDPA, renders his 1998 petition indefensibly time barred under 28 U.S.C. § 2244(d), as amended by the AEDPA. For these reasons, this Court should decline to exercise its certiorari jurisdiction to review Graham's claims.

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[6] The 1993 petition was essentially an attempt to relitigate previously rejected claims of ineffective assistance of counsel with additional evidentiary material.

II. THE LOWER COURT CORRECTLY HELD THAT GRAHAM'S FOURTH FEDERAL PETITION WAS BARRED BY THE AEDPA.

A. Graham's fourth habeas petition is not a continuation of his first habeas petition.

Graham first contends that the lower court's application of the AEDPA's successive petition bar, 28 U.S.C. § 2244(b), conflicts with this Court's opinion in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998). In *Martinez-Villareal*, the petitioner's first three federal petitions were dismissed for failure to exhaust state court remedies. The petitioner's fourth federal petition was litigated to finality on all but a claim of whether the petitioner was competent to be executed ("the *Ford*[7] claim"). The *Ford* claim was dismissed from the litigation as "premature" because an execution date had not been set. Subsequently, an execution date was set, and petitioner filed a new federal petition ("the fifth petition") raising the *Ford* claim.

The Court held that the fifth petition should not be treated as a "second or successive application" under 28 U.S.C. § 2244(b) because the petitioner did not "receive an adjudication of his claim" in his *initial* proceeding which was litigated to finality on the merits. *Martinez-Villareal*, 523 U.S. at __, 118 S.Ct. at 1620. The Court stated that "[t]o hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.* The Court noted, however:

> This case does not present the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a "second or successive

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[7] *Ford v. Wainwright*, 477 U.S. 399 (1986).

habeas corpus application" within the meaning of AEDPA.

Martinez-Villareal, 523 U.S. at __ n. __, 118 S.Ct. at 1622 n. __.

Here, Graham utterly fails to appreciate the different procedural posture of his case than that present in *Martinez-Villareal*. Most importantly, Graham ignores that his 1988 petition was litigated to finality on the merits, and no claim therein was dismissed as premature or for failure to exhaust state court remedies or for any other "technical procedural reason." Thus, as the lower court correctly found, it is not that Graham's 1998 petition is a "second or successive application" in relation to the 1993 petition, but that the 1998 petition is a "second or successive application" in relation to the 1988 petition. *Graham*, 168 F.3d at 773 n.7, 786; *see Mancuso v. Herbert*, 166 F.3d 97, 101 & n.3 (2nd Cir.) (petitioner's fifth petition was a "second or successive application" application in relation to petitioner's third petition, which had been rejected on the merits, not in relation to petitioner's fourth petition, which had been dismissed for failure to exhaust state court remedies), *cert. denied*, __ U.S. __, 119 S.Ct. 2376 (1999).

Further, Graham's contention that the Court did not apply the AEDPA to the fifth petition in *Martinez-Villareal* because it was merely a continuation of the fourth petition is simply wrong. In *Martinez-Villareal*, the Court applied the AEDPA to the fifth petition but held that the fifth petition was not second or successive in relation to the sole prior petition which had been litigated to (partial) finality on the merits, the fourth petition. Obviously, if the fifth petition was merely a continuation of the fourth petition and, therefore, the AEDPA did not apply at all, the Court would not have considered, in any manner, whether the fifth petition was a successive petition under the AEDPA. Again, the lower court here did not find that Graham's 1998 petition was second or successive in relation to his petition which had not been litigated to finality on the merits, the 1993 petition, but to his petition

which had been litigated to finality on the merits, the 1988 petition.

Finally, Graham conceded in the lower court that all claims, and the related evidentiary support, he sought to litigate in the 1993 and 1998 petitions could have been raised in the 1988 petition, and that his 1998 petition was second or successive in relation to his 1988 petition. *See Graham*, 168 F.3d at 773-74, 789-90.[8] In sum, that Graham elected to perpetually evolve his claims of ineffective assistance of trial counsel after they had been rejected during the litigation of his 1988 petition does not permit him to come under the ambit of *Martinez-Villareal* by any measure, much less to litigate whatever issues he desires *ad infinitum*.[9]

B. Applying the successive petition bar of the AEDPA to Graham's fourth habeas petition does not offend retroactivity principles.

Graham next argues that applying the AEDPA to his successive 1998 petition violates retroactivity principles of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Under *Landgraf*:

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[8] Graham has consistently acknowledged, to the lower court and to this Court, that he cannot satisfy the AEDPA's "cause" requirement for a successive petition, 28 U.S.C. § 2244(b)(2)(B)(i). However, the lower court misquoted one sentence of Graham's Motion for Order Authorizing District Court to Consider Successive Habeas Petition on page 14. *See Graham*, 168 F.3d at 789. The sentence at issue should read: ". . . . . This report was obtained through a state open records act request that could as readily have been made in connection with the first habeas proceeding *in 1988 as it was in connection with [sic] second habeas proceeding in 1993. . . .*" (emphasis in corrected portion of quote). Thus, although Graham's present habeas counsel may not have gained access to this report until 1993, *see* Petition for Writ of Certiorari at 11, Graham conceded that he could have gained access to the evidence in 1988.

[9] It should be noted that, unlike claims readily discoverable and ripe for a determination at the time of an initial petition, the peculiar nature of a *Ford* claim, arising solely with a pending execution date, factored into the Court's decision in *Martinez-Villareal*. *See Martinez-Villareal*, 523 U.S. at __, 118 S.Ct. at 1622.

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280.

This Court recently held that "the statute [the AEDPA] reveals Congress's intent to apply the amendments to chapter 153 [which include 28 U.S.C. § 2244] only to such cases as were filed after the statute's enactment." *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). There can be doubt here that Graham's 1998 petition was filed after the AEDPA's enactment, and, therefore, the AEDPA applies, including the successive petition bar of 28 U.S.C. § 2244(b). *See Felker v. Turpin*, 518 U.S. 651 (1996) (applying successive petition bar of 28 U.S.C. § 2244(b) to petition filed after enactment of the AEDPA where pre-AEDPA petition had been previously rejected).[10]

Further, if this Court's prior announcement and application of Congress's intent regarding the AEDPA (*Lindh* and *Felker*, respectively) is somehow unclear, the lower court reasonably found that applying the AEDPA in this case was not impermissibly retroactive. *See Graham*, 168 F.3d at 783-87. By its very nature, a federal habeas corpus proceeding concerns secondary, rather than primary conduct, and acts prospectively. When coupled with the procedural nature of the successive petition statute at issue, it is clear that Graham possessed no constitutionally recognizable interest in the pre-AEDPA standard for successive

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[10] This Court applied the AEDPA in *Felker*, notwithstanding the petitioner's allegation of innocence. *Felker*, 518 U.S. at 658.

petitions. *See Landgraf*, 511 U.S. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. . . . Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."). Indeed, it is singularly absurd that state prisoners possess some type of inherent right to besiege the federal courts with successive habeas petitions under any particular standard. For example, in *McCleskey v. Zant*, 499 U.S. 467 (1991), consistent with its later decision in *Felker*, this Court announced new standards for the pre-AEDPA abuse of the writ doctrine and applied that to the petition before the Court. This claim is not worthy of certiorari review.

C. If Graham's fourth petition is not barred as a successive petition, it is time barred.

Even assuming Graham could escape the AEDPA's successive bar, 28 U.S.C. § 2244 (b), one thing is certain – he cannot escape the AEDPA's time limitation bar, 28 U.S.C. § 2244(d). The statute provides:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively

applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244. However, in cases where a petitioner's conviction became final before enactment of the AEDPA, like here, the circuit courts are in general agreement that those petitioners are entitled to a one-year "grace" period from the statute's effective date to file a federal habeas petition or otherwise toll the limitations period. *See, e.g., Gaskins v. Duval*, __ F.3d __, __, 1999 WL 447129, *1-2 (1st Cir. 1999); *Rosa v. Senkowski*, 148 F.3d 134, 135-36 (2nd Cir. 1998); *Lovasz v. Vaughn*, 134 F.3d 146, 149 (3rd Cir. 1998); *Brown v. Angelone*, 150 F.3d 370, 375-76 (4th Cir. 1998); *Kiser v. Johnson*, 163 F.3d 326, 327-28 (5th Cir. 1999); *Brown v. O'Dea*, __ F.3d __, __, 1999 WL 587209, *3-4(6th Cir. 1999); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd on other grounds*, *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Nichols v. Bowersox*, 172 F.3d 1068, 1073 (8th Cir. 1999); *Dictado v. Ducharme*, __ F.3d __, __, 1999 WL 646953, *1-3 (9th Cir. 1999); *Haney v. Addison*, 175 F.3d 1217, 1220-21 (10th Cir. 1999); *Wilcox v. Florida Dept. of Corrections*, 158 F.3d 1209, 1211 (11th Cir. 1998).

Applying these principles, Graham had one year from October 1996, at the most generous,[11] to pursue his claims in state or federal court under 28 U.S.C. § 2244(d), as

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[11] For purposes of Graham's petition, the Director will assume *arguendo* that the limitations period was tolled during the pendency of Graham's 1993 petition. It should also be noted that Graham's counsel of record before the Court was lead counsel during the

amended by the AEDPA. Yet, Graham, an allegedly innocent prisoner,[12] sat idle for more than one and a half years after the 1993 petition was finally dismissed by the district court in October 1996. Graham's failure to act in state or federal court within one year of October 1996 rendered the 1998 petition indefensibly time barred.

Finally, applying the time limitation bar of 28 U.S.C. § 2244(d) to Graham's 1998 petition does not implicate retroactivity concerns in any manner. As noted above, all conduct rendering the 1998 petition time barred arose solely after the statute's enactment. For these reasons, even if the Court were to agree with Graham that the successive petition bar of the AEDPA does not apply to him, this case is not worthy of certiorari review by the Court. *See Martinez-Villareal*, 523 U.S. at __, 118 S.Ct. at 1622 (noting that petitioner's fifth petition was brought in a "timely fashion").

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pendency of Graham's appeal of the 1993 petition in the lower court.

[12] For the reasons set out at length in the Director's brief to the lower court, the Director disputes Graham's assertions of innocence and that the 1998 petition would have been considered under pre-AEDPA standards. Pointedly, when Graham finally returned to the state courts in 1998 to present his "new evidence," the Court of Criminal Appeals determined that he failed to satisfy the threshold showing of innocence required to file a successive state habeas application under TEX. CODE CRIM. PROC. art 11.071 § 5(a)(2) ("by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt."). *See Ex parte Graham*, No. 17,568-05, November 18, 1998, Order & Judge Baird concurring opinion (Appendix 6 to Graham's petition for writ of certiorari). The implied and express factual findings which flow from the Court of Criminal Appeals' order are presumptively correct. *See Marshall v. Lonberger*, 459 U.S. 422, 433-35, (1983) (implied and express factual findings and credibility choices made by the state court judges may not be redetermined by a reviewing federal court). Similarly, the federal district court has rejected Graham's claim of innocence. *See Graham*, 829 F.Supp. at 207 ("The Court determines that Graham has not met the 'extraordinarily high' threshold showing of actual innocence.").

III. THE LOWER COURT PROPERLY REFUSED TO RECALL ITS PRIOR MANDATE.

A. Graham's motion to recall the prior mandate was subject to the AEDPA.

In addition to finding the 1998 petition barred by 28 U.S.C. § 2244(b), as amended by the AEDPA, the lower court denied Graham's motion to recall the mandate of the 1993 petition. According to Graham, the lower court should have applied a miscarriage of justice standard to his motion, rather than the successive petition bar of the AEDPA.

The Court recently identified the two forms of recalling a prior mandate in a § 2254 case: (1) an appellate court *sua sponte* recalling its prior mandate; and (2) a petitioner moving the court to recall its prior mandate. *Calderon v. Thompson*, __ U.S. __, __, 118 S.Ct. 1489, 1500 (1998). In the case of a *sua sponte* recall of a prior mandate, the appellate court must only act to avoid a miscarriage of justice. *Thompson*, __ U.S. at __, 118 S.Ct. at 1502. However, the successive petition bar of the AEDPA, 28 U.S.C. § 2244(b), may nevertheless apply to the reopened cause. *Thompson*, __ U.S. at __, 118 S.Ct. at 1500.

In contrast, the successive petition bar of the AEDPA, 28 U.S.C. § 2244(b), applies when a petitioner moves the court to recall its prior mandate:

> In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply).

Id.

Here, it is beyond cavil that the lower court correctly characterized Graham's motion

to recall the mandate as a second or successive petition, and, based on Graham's admission, correctly concluded that the matter was barred pursuant to the AEDPA. *Graham*, 168 F.3d at 788-90. Graham's claim that the lower court's decision automatically renders *any* motion to recall a prior mandate filed by a petitioner to be rejected simply because the motion was made is absurd. Consistent with *Thompson*, the lower court said no more than that such a motion would have to satisfy the AEDPA standards. Moreover, as noted *supra*, even if Graham can avoid the AEDPA successive petition standards, he entirely fails to circumvent the AEDPA time limitation standards by his failure to act for more than one and a half years after his 1993 petition was dismissed. This claim is not worthy of certiorari review.

B. The denial of Graham's motion to recall the prior mandate did not deprive Graham of due process.

Graham next contends that the lower court's refusal to recall its prior mandate deprived him of due process because the delays in his case are entirely attributable to the courts, not him. However, for whatever reasons he now seeks to excuse his actions, it must be remembered that Graham has consistently acknowledged that all present claims, and the attendant evidentiary support, were available to Graham more than eleven years ago when he filed his first federal petition, the 1988 petition. It must also be remembered that, even after Graham's first petition was denied on the merits, he filed his 1993 petition in federal court with knowledge that all claims and evidence had not previously been presented to the state courts rendering the petition subject to dismissal for failure to exhaust state remedies. Finally, and most significantly, it must be remembered that even after the 1993 unexhausted petition was dismissed in 1996, Graham waited more than one and a half years to raise his claims, which were available in 1988, to the state or federal courts. In sum, Graham's attempt to now lay blame on the courts for any delay is utterly disingenuous.

Finally, although the claim has been rejected by the state and federal courts, *see* footnote 12, Graham has an available avenue to pursue his claim of alleged innocence through the state clemency process. For example, the petitioner in *Lucas v. Johnson*, 132 F.3d 1069 (5th Cir.), *cert. dismissed*, __ U.S. __ (1998), obtained executive clemency on claims of actual innocence through the same avenue available to Graham.

CONCLUSION

For the foregoing reasons, the Director respectfully requests this Court to deny Graham's petition for writ of certiorari.

Respectfully submitted,

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